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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re TYLER S., a Person Coming Under
the Juvenile Court Law.

2d Juv. No. B176919
(Super. Ct. No. SBJ 23173)
(Santa Barbara County)

SANTA BARBARA COUNTY CHILD
WELFARE SERVICES,

Plaintiff and Respondent,

v.

STEVEN S.,

Defendant and Appellant.

Appellant Steven S. appeals from orders of the juvenile court declaring his nephew, Tyler S., a dependent of the juvenile court and setting a permanency planning hearing for Tyler pursuant to Welfare and Institutions Code section 366.26.¹ He challenges the court's jurisdictional and dispositional findings, arguing among other things that his constitutional rights were violated by the removal of the child from his home. We reject his contentions and affirm.

¹ All statutory references are to the Welfare and Institutions Code unless otherwise stated.

Factual and Procedural Background

In 1997, Tyler became the subject of juvenile dependency proceedings at the age of one month, after his mother was arrested for child endangerment and being under the influence of a controlled substance. He was ultimately placed in the home of his maternal grandmother, Judy B. In 1999, the parental rights of Tyler's biological parents were terminated. Judy then legally adopted Tyler and dependency proceedings were dismissed.

On May 9, 2004, Judy died of a terminal illness. Respondent Child Welfare Services (CWS) filed a petition alleging that Tyler (then age 7) came under the jurisdiction of the juvenile court. (§ 300, subds. (b) [failure to protect] & (g) [no provision for support].) CWS alleged that Judy had left Tyler in the care of his maternal uncle, appellant, prior to her death, but she did not make arrangements to transfer legal custody of the child. CWS was unable to consider appellant for relative placement because he had a criminal history and had recently been released from jail on work furlough.

On May 20, 2004, the juvenile court ordered Tyler detained. Appellant appeared and was permitted to address the court as a relative. He objected to Tyler's detention. Following the detention hearing, Tyler was placed with his maternal grandfather (Judy's ex-husband) and his wife. The court set the matter for a jurisdictional hearing on June 14.

In a report prepared for the jurisdictional hearing, CWS advised the court that its decision to detain Tyler was the culmination of several months of referrals and attempts to work with Judy and appellant to ensure the legal permanency of the child. CWS received six referrals between December 19, 2003, and May 5, 2004, concerning Tyler's care and the need for Judy to make plans for his legal custody.

In December of 2003, CWS received a referral that Judy had allowed Tyler's biological mother to reside with her and Tyler, and the biological mother had brought drugs and guns into the home. When CWS spoke to Judy about the referral, she

stated the biological mother had been out of prison for three months and was living in the home, but denied that she had brought drugs and guns into her home.

CWS met with appellant on January 5, 2004, and he expressed his desire for full custody of Tyler. He was advised to begin adoption proceedings as soon as possible, that CWS might intervene if he did not get legal custody prior to Judy's death, and that there was no guarantee that Tyler would be placed with him.

In February of 2004, CWS received a second referral alleging that the biological mother was caring for Tyler while Judy was hospitalized, and that appellant did not know this because he had left the child in the care of a neighbor. CWS again advised appellant to obtain a guardianship application as soon as possible. He stated he would get one that day and that the biological mother was using drugs and was completely irresponsible.

On March 10, 2004, CWS received a referral that Judy was terminally ill, in hospice, and that the proposed relative placement with appellant did not meet relative approval standards. CWS again advised appellant to pursue guardianship of Tyler through the probate court.

On March 26, 2004, CWS received a referral alleging general neglect of Tyler by appellant. The referral alleged that Judy had placed Tyler with appellant because she was in hospice care, appellant had left the child in the care of the biological mother while at work, and the biological mother had in turn left Tyler unattended in Judy's hospice room while she "went to a bar to meet a friend." CWS was also concerned about possible fiduciary abuse of Judy's assets.

On April 9, 2004, CWS conducted a meeting with Judy to create a safety plan for Tyler given her terminal illness. Judy stated that she wanted Tyler to be raised by appellant. She and appellant were advised that CWS could not approve appellant as a relative placement because of his criminal record, i.e., he had an active warrant and a past arrest for assault to commit rape. Judy was advised to draw up a will, declaring her wish to have Tyler placed in appellant's care. Appellant was advised that he would have to

clear his criminal record before he could be considered for adoption of Tyler. In the event Judy and appellant failed to follow through with these tasks, a back-up plan was established to have Tyler's uncle, Kenneth B., and Tyler's maternal grandfather and wife begin the relative approval process for placement.

On April 26, 2004, CWS received a referral alleging that Judy was incapacitated, that Tyler was in appellant's care, and that appellant had been arrested and was incarcerated. Law enforcement made arrangements for Tyler to be cared for by the maternal grandfather. Tyler had been living with appellant for about three weeks prior to his arrest.

On April 29, 2004, appellant appeared in custody on a probation violation and was sentenced to 70 days in jail. His sentence was the result of a repeated failure to report to jail for a conviction arising out of a hit-and-run accident. (Veh. Code, § 20001, subd. (a).)

On May 5, 2004, CWS received a referral alleging caretaker absence and incapacity, alleging that appellant had resumed care of Tyler, but that he remained under house arrest. CWS was concerned that appellant could not properly care for the child while under house arrest.

On May 9, 2004, Judy died without making a will or transferring the adoption of Tyler to appellant. At the time, Tyler was staying with appellant who was released from jail on work furlough and house arrest through June 4, 2004. Appellant was allowed to leave his house only for work, court, and to take Tyler to and from school.

On May 19, 2004, CWS initiated these dependency proceedings. CWS alleged that despite its numerous requests, neither appellant nor Judy had followed through on plans for Tyler's legal custody.

On June 3, 2004, appellant filed a motion objecting to the court's jurisdiction over Tyler, and arguing that CWS lacked grounds to remove Tyler from his custody. He also filed an application for de facto parent standing. He stated that Judy placed Tyler in his care prior to her death when she became too ill to care for him. He

claimed he had a relationship with Tyler since birth, he had been picking him up from school for the last year, and had been working with a grief counselor to help Tyler cope with Judy's death.

At a hearing conducted on June 9, 2004, appellant was permitted to address the juvenile court as a relative. The court ruled that de facto parent status did not apply until disposition, but that appellant was permitted to be present at the contested jurisdictional hearing and address the court through his attorney. He was not allowed to present evidence or cross-examine witnesses.

On June 14, 2004, at the contested jurisdictional hearing, CWS reported that appellant had still not begun the relative application process. The court found the allegations of the petition true under section 300, subdivisions (b) and (g), that Tyler should be placed under the supervision of CWS with an approved relative, and set the matter for a disposition hearing on July 26. The court continued appellant's request for de facto parent status to June 16.

Thereafter, CWS opposed appellant's motion for de facto status, arguing that he did not qualify as a de facto parent because he had assumed responsibility for Tyler for an insufficient period of time, i.e., only three months between February and May of 2004. CWS also argued that appellant had failed to take the necessary steps to ensure legal permanency for Tyler, and it was questionable, therefore, whether he had Tyler's best interests at heart.

Following an evidentiary hearing, the court granted appellant's request for de facto parent status. The court then set a contested disposition hearing for Tyler for July 26 and August 3, 2004.

On July 26, 2004, at the contested disposition hearing, the parties agreed the court could treat the facts contained in the disposition reports as true and submit the issues to the court for a ruling on the legal rights of a de facto parent at disposition.

Appellant argued that the issue was whether the juvenile court had the authority to remove Tyler from his home without evidence of physical or emotional

abuse. He argued that, as the de facto custodial parent, he was denied his constitutional rights to due process and equal protection of the law.

CWS argued that a de facto parent does not have the right to placement, custody, or reunification services. CWS argued that when a parent is deceased and a child has no legal guardian, the court at the disposition hearing must address placement. In this case, it argued, appellant did not qualify for relative placement.

After taking the matter under submission, the court issued its rulings on July 28 and August 3, 2004. The court ruled that the rights of a de facto parent were not the same as that of an adoptive parent or a legal guardian. The court reasoned:

"This is not a situation where CWS came swooping out of the skies battering down doors and pulling a child from a relative, whether they be a de facto parent or were otherwise. This was a case where CWS became involved as in the normal course of events investigating referrals concerning the welfare of Tyler.

"There were, by the Court's count, five referrals over a four month period of time. Because Tyler's adoptive mother was at the time of the first referral going through the final stages of a terminal disease, recommendations were made to the adoptive mother and to [appellant] on how to go about effectuating what was the apparent intent of the adoptive mother to have [appellant] take over as the guardian of the minor. For one reason or another, none of those recommendations was effectuated. [¶] . . .

"The minor was detained . . . after the death of the adoptive parent and at a time while [appellant] was dealing with outstanding criminal issues that resulted among other things in his incarceration and then house arrest.

". . . Ultimately the rights of a de facto parent are certainly no greater than those of a parent or guardian, and the authority seems to hold that they are somewhat less.

"Those rights do not include the right to automatic placement. That by way of statute and case law is left up to CWS. There are requirements, and [appellant] and his attorney are well-aware of them because they were advised of those requirements at least back in January or February. That has to deal with cleaning up the outstanding criminal

history matters and/or seeking some sort of a waiver before placement of the minor can be effected with the uncle."

The court declared Tyler a dependent of the court (§ 300, subds. (b) & (g)), ordered him placed in the custody of CWS for placement in the approved home of a relative or a licensed foster care home, and ordered CWS to prepare an assessment pursuant to section 361.5, subdivision (g). The court set a section 366.26 hearing for December 1, 2004.

Discussion

Appellant primarily contends that the removal of Tyler from his custody violated his state and federal constitutional rights, including equal protection, due process, and free speech. He argues that a family member to whom custodial rights over a child have been granted by a parent prior to the parent's death has a constitutionally protected interest in the continuing care, custody, and maintenance of the child. Because there was no evidence that Tyler was subject to either physical or emotional abuse while in his custody, he argues there was no legitimate basis for removing the child from his custody. Expanding upon this theme, appellant challenges the juvenile court's order approving the detention of Tyler, and its jurisdictional and dispositional orders. For the reasons expressed below, appellant's contentions are without merit.

First, to the extent appellant challenges the juvenile court's order approving the detention of Tyler by CWS, findings made at the detention phase are mooted by the jurisdiction and dispositional determinations and cannot be raised on appeal. (*In re Raymond G.* (1991) 230 Cal.App.3d 964, 967.)

Second, appellant lacks standing to appeal from the juvenile court's jurisdictional findings. The jurisdictional findings were made before appellant received permission to appear as a de facto parent in these proceedings. Relatives lack standing to challenge a jurisdictional finding of a court. Even assuming appellant's request for de facto parent status had been granted prior to the court's jurisdictional findings, the interest of a de facto parent begins at disposition, not before. An appellant or petitioner may

contest only those orders that injuriously affect him or her. (*In re Crystal J.* (2001) 92 Cal.App.4th 186, 189-190.) "[T]he de facto parenthood doctrine never contemplated a nonparent's participation in that capacity at the *jurisdictional* stage of a dependency proceeding." (*In re Kieshia E.* (1993) 6 Cal.4th 68, 79; Cal. Rules of Court, rule 1412(e).)

Third, even assuming appellant has standing to contest the jurisdictional findings, we conclude that substantial evidence supported the juvenile court's findings. (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 820 [substantial evidence test applies to juvenile court's finding that child came within the statutory definition of a dependent child].) It was undisputed that Tyler had been staying with appellant shortly before Judy died, but that no provision had been made to transfer legal custody of the child to him. Despite repeated admonitions by CWS to appellant and Judy months before her death, Judy did not provide for Tyler's custody in a will or arrange for appellant to become his guardian or adopt him. Nor did appellant independently pursue guardianship proceedings in probate court prior to Judy's death. Consequently, Tyler was left without any provision for his support and without a parent or legal guardian to provide for his care. CWS was reasonably concerned about the welfare of a child who was staying with an individual who was incarcerated, under house arrest, and admittedly leaving the child in the care of someone who was using drugs (the biological mother) and whose parental rights had been terminated. For these reasons, the evidence supported the court's finding that it had jurisdiction over Tyler under section 300, subdivisions (b) and (g).

We reject appellant's contention that the juvenile court did not have jurisdiction over Tyler because the previous dependency proceedings had been dismissed. "Any child who comes within any of the [descriptions set forth in section 300] is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court." (§ 300.)

Fourth, substantial evidence also supports the juvenile court's findings at the disposition hearing. Under sections 361 and 361.2, at the disposition hearing, the

court must first determine whether the child should be removed from the physical custody of the parent and placed with a non-custodial parent. Under section 361.2, a parent is one on whom that status is conferred either naturally or by adoption. (See generally *In re Jodi B.* (1991) 227 Cal.App.3d 1322, 1326-1328.) Contrary to appellant's contention, Judy's custodial rights were not assigned to him. Judy did not nominate appellant as guardian in a will or relinquish or assign her adoption to him. Tyler was left without any provision for his support and had no parent or guardian to provide for his care. Where, as here, the child has no parent, section 361.2 requires that the court order the care, custody, and control of the child to be under the supervision of the social worker, who may in turn place the child in an approved home of a relative or a licensed foster home. Tyler was placed in the home of his maternal grandfather who had completed the relative approval process with CWS. The court's dispositional order complied with section 361.2.

Appellant was repeatedly informed that he probably would not qualify for relative placement because of his unresolved criminal record. (§§ 309, 361.4, subd. (d)(2).) Under section 361.4, subdivision (d)(2), if the criminal records check reveals that the relative has a conviction for a crime other than a motor vehicle violation, as does appellant, the court is precluded from placing the child with the relative unless an exemption is granted by the county. "Section 361.4, subdivision (d)(2) does not confer on the juvenile court any discretion to avoid its prohibition." (*Los Angeles County Dept. of Children & Fam. Services v. Superior Court* (2001) 87 Cal.App.4th 1161, 1166.) Appellant was told months before Judy's death to clear his criminal record and to initiate guardianship and adoption proceedings if he wanted custody of Tyler. After Judy's death, he did not follow through with any attempt to apply for relative placement until after the jurisdiction hearing. At the time of the disposition hearing, he had not completed that process. We reject appellant's contention that the juvenile court's dispositional order violated his or Tyler's constitutional rights. Appellant lacks standing to assert violations of Tyler's constitutional rights. Tyler's counsel agrees with the court's findings below.

Appellant has failed to demonstrate that as a relative or de facto parent, he has any constitutional rights in the care, companionship and management of Tyler. (E.g., *Miller v. California* (9th Cir. 2004) 355 F.3d 1172, 1176 [grandparents acting as de facto parents do not have a substantive due process right to family integrity or association with their grandchildren].)

A person becomes a de facto parent by application to the court when he or she has participated in the day-to-day care and rearing of the child over an extended period of time. (*In re B.G.* (1974) 11 Cal.3d 679, 692, fn. 18.) As a de facto parent, the person becomes a party and is permitted to participate in the dependency proceedings to assert and protect his or her own "interest in the "companionship, care, custody and management" of that child." (*Clifford S. v. Superior Court* (1995) 38 Cal.App.4th 747, 751.) De facto parents have the right to be present at the dependency proceedings, to be represented, and to present evidence at the hearings. (*Id.* at p. 752.) "However, the status of de facto parenthood does not give de facto parents the rights and responsibilities of parents or guardians. [Citation.] Specifically, they do not have the right to reunification services, custody, or visitation." (*Ibid.*)

None of the authorities cited by appellant stand for the proposition that de facto parent status confers on an uncle and a nephew a constitutional right to maintain a custodial and familial relationship without interference from a state agency. The authorities cited by appellant are inapposite for the reasons expressed in the answering briefs filed by CWS and Tyler's counsel. Appellant's contentions are without merit.

Appellant's Entitlement to Attorney's Fees

Title 42 United States Code section 1988(b) provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee" as part of the costs in actions brought pursuant to certain specified civil rights statutes, including United States Code section 1983. Appellant contends that he is entitled to an award of attorney's fees under section 1988 because this proceeding seeks redress based upon rights enumerated in section 1983. We disagree.

Aside from the fact that appellant is not a prevailing party, United States Code section 1988 applies on its face only to an action brought under one of the sections specified in the statute. A juvenile dependency proceeding is not brought pursuant to United States Code section 1983 or any other provision listed in section 1988. Appellant is not entitled to an award of attorney's fees for prosecuting this appeal or for responding to the juvenile dependency proceedings below.

The orders of the juvenile court are affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

Clifford R. Anderson, Judge

Superior Court County of Santa Barbara

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